Supreme Court of the United States

JOHN F. DAVIS, CLERK

October Term, 1967

No. 1055

CURTIS B. DANNING, Trustee in Bankruptcy,

Petitioner,

vs.

FRANCIS MINTZ,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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SUBJECT INDEX

	Page
Citation to Opinions Below	1
Jurisdiction	1
Question Presented	2
Statute Involved	2
Statement	2
Reasons for Granting the Writ	7
Conclusion	7

INDEX TO APPENDICES

Appendix A. Opinion of the United States Court of Appeals for the Ninth Circuit	1
Appendix B. Section Seventy (11 U.S.C. § 110)	11
Appendix C. (31 U.S.C. § 203)	14

TABLE OF AUTHORITIES CITED

Cases

Ideal Mercantile Corp., Matter of, 244 F. 2d 828 ..... 4, 5, 6

Martin v. National Surety Company, Co., 300 U.S. 588 ..... 3, 4, 5

National Bank of Commerce v. Downie, 218 U.S. 345 4

Segal v. Rochelle, CCH, Bankr. Rep. Para. 61555 ..... 5, 6

United States v. Aetna Casualty Insurance Co., 338 U.S. 366 4

Statutes

Bankruptcy Act, Sec. 70(a) 2, 5, 6

Bankruptcy Act, Sec. 70a(5) 5, 6

United States Code, Title 11, Sec. 110 ..... 2, 5

United States Code, Title 28, Sec. 1254(1) 1

United States Code, Title 31, Sec. 203 ..... 2, 3

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled case on October 4, 1966.

Citation to Opinions Below.

The opinion of the Court of Appeals, printed in Appendix A hereto, *infra,* p. 1 reported in 367 F. 2d 304. The Referee in Bankruptcy did not write an opinion, nor did the District Court.

Jurisdiction.

The judgment of the Court of Appeals was entered on October 4, 1966. Rehearing was denied on November 25, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Question Presented.

1. Whether an assignment of a bankrupt's Federal Income Tax refund prior to commencement of the bankruptcy proceedings is valid as against the Trustee in Bankruptcy when the assignment fails to comply with Title 31 U.S.C. Section 203, which is the Federal Assignment of Claims Act, and when the refund is received subsequent to bankruptcy.

Statute Involved.

That the statutory provision involved is Section 70(a) of the Bankruptcy Act, 11 U.S.C. Sec. 110. It is printed in Appendix B, *infra,* p. 11, 31 U.S.C. Sec. 203, Federal Assignment of Claims Act. It is printed in Appendix C, *infra* page 14.

Statement.

On March 6, 1963, the bankrupt assigned all his interest in his 1962 income tax refund to his attorney for legal fees. This "assignment" was made by written document. It is undisputed that the assignment did not comply with the Federal Assignment of Claims Act, 31 U.S.C. Section 203. On June 29, 1964, after the "assignment" had been made but before payment had been made by the government, the assignor filed a voluntary petition in Bankruptcy and was declared bankrupt on the same day. Subsequently, government checks for the amount of the refund, payable to the assignor were delivered to Mintz, the assignee.

Danning, as Trustee in Bankruptcy, made demand on Mintz for the money received as a tax refund by the bankrupt. Mintz refused to turn over the refund money because the assignment was made more than four months prior to bankruptcy. Subsequently, the Trustee filed an application in the bankruptcy proceed-

ings to determine his right to the refund. The question was briefed and argued before the Referee in Bankruptcy. The Referee found the "assignment" not to be valid because of the failure of the "assignment" to comply with the Assignment of Claims Act, 31 U.S.C. Section 203. Consequently, the Referee held that the tax refund was an asset of the bankrupt's estate and that Mintz had to turn over the refund to the Trustee.

A petition for a review was filed in the United States District Court. The District Court reversed the holding of the Referee by finding that the assignment could be valid between the parties even though it did not comply with the Federal Assignment of Claims Act. The question of the applicability of California assignment law was remanded to the Referee.

The Trustee appealed to the United States Court of Appeals for the Ninth Circuit, and on October 4, 1966, the Court of Appeals rendered its opinion sustaining the district court Judge. A petition for rehearing before the Circuit Court of Appeals was denied on November 25, 1966.

In its opinion, the Court of Appeals made the following important point:

I.

> "The Referee relies primarily upon the case of *National Bank of Commerce v. Downie,* 218 U.S. 345 (1910) in light of which authority the Referee's conclusions would seem to be correct. But although the *Downie* case has never been specifically overruled, it has been explained, distinguished and circumvented to the point that it no longer states the law."

The Court then cites as authority *Martin v. National Surety Company, Co.,* 300 U.S. 588 (1937); *United*

States v. Aetna Casualty Insurance Co., 338 U.S. 366 at 373 (1949); *In the Matter of Ideal Mercantile Corp.*, 244 F. 2d 828 (2d Cir. 1957).

II.

"If the case cited by the Referee, *National Bank of Commerce vs. Downie*, 218 U.S. 345 (1910), were the only case interpreting the effect of an assignment between the private parties involved which did not meet the requirements of the Assignment of Claims Act, the Referee would clearly be correct."

The United States District Court and the Ninth Circuit Court of Appeals relied on the decisions, cited above, which purportedly "distinguished and circumvented" *Downie* to the point that no longer states the law. Such is not the case.

The Supreme Court in *National Bank of Commerce v. Downie*, 218 U.S. 345 (1910) held that the assignment of an unpaid and unallowed claim against the United States was void against the subsequently appointed bankruptcy trustee. There, the Court stressed that the assignment itself was null and void. Subsequently, the Supreme Court in *Martin v. National Surety Company*, 300 U.S. 588 (1937) limited *Downie* to assignments of unpaid claims and indicated that the relevant act was for the protection of the government:

". . . (T)he government in not concerned to regulate the equities of claimant growing out of irregular assignments when collection is complete and liability is ended * * * transfer of the fund after payment is perfected is of no concern to anyone except the parties to the transaction, and this quite irrespective of the time of assignment or the manner of its making." (p. 595).

In the *Martin* case, the fund being contested by rival claimants was already on deposit with the Court, so that the government was not confronted with possible multiple payment of claims. Also, the facts of that case strongly supported the upholding of an assignment, as against execution of a subsequent power of attorney, since the latter had been made with full knowledge by the parties of the prior transaction, in addition to the presence of other circumstances indicating misconduct.

The Second Circuit, in *Matter of Ideal Mercantile Corp.*, 244 F. 2d 828 (1957), held that a purported assignment of refunds of custom duties which had been paid to the United States under protest, before such claims had been allowed or warrants issued for their payments, was unenforceable between the parties. Accordingly, the assignment was deemed to have been "perfected" just prior to filing of bankruptcy, thus giving rise to a preference and an act of bankruptcy for purposes of an involuntary petition in bankruptcy.

The Supreme Court recently held in *Segal v. Rochelle*, CCH. Bankr. Rep. Para. 61555 (dec. January 18, 1966) that a bankrupt's right to a loss carry back income tax refund vests in the bankruptcy trustee under Section 70a of the Bankruptcy Act (11 U.S.C. 110). In order to reach this conclusion, the Court found that this asset was "transferrable" and "property" as required by Section 70a(5).

> "The Trustee . . . shall in turn be vested by operation of law with the title of the bankrupt as to date of filing of the petition * * * (5) property, including rights of action, which prior to the filing of the petition he could by means have transferred . . .".

The *Segal* holding that the tax refund claim is for purposes of Section 70a(5) is compatible with the continued requirement that a voluntary transfer prior to bankruptcy must comply with the Act. Furthermore, at the date of bankruptcy, the refund had not yet been paid by the government, so that a trustee claiming title thereto under Section 70a would be competing with the prior purported assignee; accordingly, as of the date the Trustee was appointed, the government was in fact confronted with these competing claims, thus raising the need for compliance with the Act namely to prevent possible multiple payment of claims, and to save the United States defenses such as set-off or counter-claim which it might have against the assignor.

Failure of the purported assignment to comply with the Federal Assignment of Claims Act leaves the Trustee in Bankruptcy with title on either of two approaches. Firstly, his title under Section 70a is superior to the defective assignment, and secondly, in accordance with the holding of the *Ideal* case, the assignment could be deemed to have been made immediately before filing of the bankruptcy petition, so as to give rise to a preference and an act of bankruptcy. At the time the Trustee was appointed, the claim had not yet been paid, there were two competing claimants, and the purpose of the Act to protect the government was applicable.

Reasons for Granting the Writ.

1. The Supreme Court has unique supervisory authority over the bankruptcy proceedings, and there are a few areas of bankruptcy law presently in such a state of flux and confusion as the area of the rights of trustee's to Income Tax refunds and whether those rights can be defeated by assignment on the eve of bankruptcy. This situation is arising in thousands of wage earner bankruptcies each year with divergent result. An authoritative determination for a uniform result is imperative.

Conclusion.

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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